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No._____

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IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The question presented is whether 49 U.S.C. §10905 preempts the exercise of sovereign power of eminent domain over an abandoned railroad line where a railroad has abandoned a rail line in Minnesota under the following conditions:

(1) the Interstate Commerce Commission has given its approval,

(2) the ICC has relinquished all jurisdiction and interest in the rail line, and

(3) a statutorily authorized rail company has properly invoked Minnesota condemnation law in order to recommence rail service to citizens in Minnesota.

LIST OF PARTIES

In addition to the captioned parties, the States of Iowa and Wisconsin filed pleadings amicus in support of the joint petition of the Hayfield Northern and the State of Minnesota for rehearing and rehearing en banc.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	i
Table of Authorities	vi
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Raising the Question	4
Statement of Facts	4
The Question is Substantial	7
Whether State Power of Eminent Domain May Be Exercised on Abandoned Property That Once Was a Rail Line Regulated by the Federal Government	7
Conclusion	19

APPENDIX INDEX

Page

Appendix A—Opinion (filed December 3, 1982, in the Court of Appeals) A-1

Appendix B—Judgment (filed December 3, 1982, in the Court of Appeals) A-12

Appendix C—Judgment and order (filed July 22, 1982, in the District Court) A-13

Appendix D—Order denying rehearing and rehearing en banc (filed January 18, 1983, in the Court of Appeals) A-16

Appendix E—Notice of Appeal to the Supreme Court of the United States (filed February 24, 1983, in the Court of Appeals) A-17

Appendix F—Title 49 U.S.C. 10905 ..... A-20

Appendix G—Title 49 U.S.C. 10903 ..... A-25

Appendix H—Order denying stay of mandate (filed on February 9, 1983, in the Court of Appeals) A-26

Appendix I—Denial of the stay of mandate by the Supreme Court (per Circuit Justice Blackmun on February 10, 1983) A-27

Appendix J—Denial of the stay of mandate (per Justice Rehnquist filed on February 22, 1983) A-28

Page

Appendix K—Denial of the stay of mandate by the full Court (filed on March 7, 1983) A-29

Appendix L—Amicus memorandum of the United States (filed by the Solicitor General on February 18, 1983) A-30

Appendix M—Pleadings of the Association of American Railroads A-32

Appendix N—Office of the General Counsel of the I.C.C. memorandum dated April 27, 1982 ..... A-42

Appendix O—Office of the General Counsel memorandum of the I.C.C. dated December 22, 1982 .. A-50

Appendix P—Office of Proceedings (ICC) memorandum of December 27, 1982 ..... A-54

Appendix Q—General Counsel Memorandum to Solicitor General dated February 18, 1983 ..... A-58

Appendix R—Letter from Governmental Affairs of the ICC A-64

Appendix S—Wis. Const. art. VIII, § 10 ..... A-65

Appendix T—Wis. Stat. Ann. § 85.09 (West 1982) A-66

TABLE OF AUTHORITIES

Page

Cases:

Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 12

Chicago and North Western Transportation Company v. United States, 678 F.2d 665 (7th Cir. 1982) 8, 14

Commonwealth v. Bartlett, 266 F.Supp. 390, 393 (D.Mass. 1967), *aff'd*, 384 F.2d 819 (1st Cir. 1967) *cert. denied*, 390 U.S. 1003 ..... 12, 17

Equal Employment Opportunity Commission v. Wyoming, 51 U.S.L.W. 4219 (March 2, 1983) 10

Gibbons v. United States, 660 F.2d 1277, 1234 (7th Cir. 1981) 8

Hayfield Northern Railroad Company, Inc. v. Chicago and North Western Transportation Company, 693 F.2d 819 (1982) 5, 9, 13

Huron Portland Cement Company v. City of Detroit, 362 U.S. 440 (1960) 12

Interstate Commerce Commission v. Chicago North Western Transportation Company, 533 F.2d 1025, 1028 (8th Cir. 1978) 8

Kansas City Area Transportation v. Ashley, 555 S.W.2d 9 (Missouri 1977) 12, 17

Kessler v. Department of Public Safety, 369 U.S. 153 (1962) 12

Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1869) 17

Morton v. Mancari, 417 U.S. 535 (1974) 12

National League of Cities v. Usery, 426 U.S. 833 (1976) 17

New Orleans Terminal Company v. Spencer, 366 F.2d 160, 164 (1966) 11, 17

Simmons v. Interstate Commerce Commission, 697 F.2d 326 (D.C. Cir. 1982) 9, 13, 16

Page

Texas v. White,
74 U.S. (7 Wall.) 700 (1869) 17
United States v. Borden Company,
308 U.S. 188 (1939) 12
United Transportation Union v. Long Island
Railroad Company, 458 U.S. 678 (1982) 17

Administrative Decisions:
Ex Parte No. 274 (Sub-No. 6), Abandonment of
Railroad Lines and Discontinuance of Service
(49 C.F.R. Part 1121) 365 I.C.C. 249 (1981) 11, 13
Finance Docket No. 28990F, Common Carrier Status
of States, State Agencies and Instrumentalities and
Political Subdivisions, 363 I.C.C. 132, 135 (1980) .. 13
Modern Handcraft, Inc.-Abandonment in Jackson
County, Mo., 363 I.C.C. 969 (1981) 9, 13

Federal Constitutional Provisions:
Article 6, Section 2, United States Constitution 3
Article 1, Section 8, United States Constitution 3

Federal Statutory Provisions:
28 U.S.C. 1254(2) 6, 19
49 U.S.C. § 10903 (Supp. IV 1980) 3, 9
49 U.S.C. § 10905 (Supp. IV 1980) 3, 4, 5, 9, 11, 14, 18

Congressional Materials:
H.R.Rep No. 96-1430, 96th Cong., 2d Sess. 125
(1980) 15
H.R.Rep No. 96-1035, 96th Cong., 2d Sess. (1980),
reprinted in U.S. Code Cong. Ad News 3988 10

State Constitutional Provisions:
Wis. Const. art. VIII, § 10 18

Page

State Statutes:

Minn. Stat. § 222.27 (1982) 2, 4

Minn. Stat. § 300.04 (1982) 3, 4

Secondary Authorities:

Nichols, THE LAW OF EMINENT DOMAIN (3rd Ed. 1981) § 1.141 [2] 17

Wright, Miller and Cooper, *Federal Practice and Procedure* § 4037, p. 39 (1978) 6

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CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellant Hayfield Northern Railroad, Inc., and appellant/intervenor State of Minnesota jointly appeal from the judgment and opinion of the United States Court of Appeals for the Eighth Circuit of December 3, 1982, declaring that the Minnesota law providing for the taking of abandoned railroad property by eminent domain is preempted by 49 U.S.C. §10905.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) affirming the order of the district court is reported at 693 F.2d 819. The order of the district court granting summary judgment to Chicago and North Western (Appendix C) is not reported.

JURISDICTION

The judgment (Appendix B) and opinion of the Court of Appeals were entered on December 3, 1982. The motion for rehearing and rehearing *en banc*, timely filed, was denied on January 18, 1983 (Appendix D). A notice of appeal to this Court was filed on February 24, 1983 (Appendix E). Jurisdiction is conferred on this Court by 28 U.S.C. 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Minn. Stat. § 222.27 (1982) provides as follows:

> *Power to acquire property*—Every foreign and domestic railroad corporation shall have the power to acquire, by purchase or condemnation, all necessary roadways, spur and side tracks, rights of ways, depot grounds, yards, grounds for gravel pits, machine shops, warehouses, elevators, depots, station houses, and all other structures necessary or convenient for the use, operation, or enjoyment of the road, and may make with any other railroad company, such arrangements for the use of any portion of its tracks and roadbeds as it may deem necessary.

Minn. Stat. § 300.04 (1982) provides as follows:

> *State and local control; eminent domain*—The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation and from time to time to fix the compensation which it may charge or receive for its services. Every such corporation obtaining a franchise from a city shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality. Every such corporation may acquire by right of eminent domain such private property as may be necessary or convenient for the transaction of the public business for which it was formed. No street railway company shall have or exercise such right within the limits of any city.

49 U.S.C. §10905 (*Offers of Financial Assistance to Avoid Abandonment and Discontinuance*) is set forth in Appendix F.

49 U.S.C. §10903 (*Authorizing Abandonment and Discontinuance of Railroad Lines and Rail Transportation*) is set forth in Appendix G.

Article 6, Section 2 of the United States Constitution provides as follows:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article I, Section 8 of the United States Constitution provides as follows:

> "Congress shall have power . . . [To] regulate Commerce . . . among the several states . . ."

STATEMENT OF THE CASE

Raising the Question

Hayfield Northern Railroad Corporation (Hayfield Northern) and the State of Minnesota ("State") have contended at all stages of the proceedings in briefs and in argument that Minnesota may exercise the power of eminent domain on an abandoned rail line. Under Minnesota law this power has been properly delegated by statute to the Hayfield Northern Railroad. Hayfield Northern and the State have also contended at all stages that after an Interstate Commerce Commission (ICC) certificate of abandonment has been issued, the rail line in question is not in commerce and the federal interest in that line is at an end. Therefore, the disposition of abandoned rail property is a matter beyond federal jurisdiction and within a State's reserved jurisdiction. The lower courts found that 49 U.S.C. § 10905 preempts condemnation of abandoned rail lines.

Statement of Facts

Appellant Hayfield Northern Railroad Company, Inc., is a Minnesota public service corporation. It was formed in the Spring of 1982 to restore rail service to rural Dodge County, Minnesota. Minnesota law delegates to Hayfield Northern the power to condemn abandoned rail lines. Minn. Stat. § 222.27 (1982); Minn. Stat. § 300.04 (1982).

Appellee Chicago and North Western Transportation Company (CNW) has abandoned 19.2 miles of track in Dodge and Mower Counties, Minnesota. This abandonment was consistent with all federal abandonment requirements including the compulsory forced sales provision of the Staggers Rail Act, 49 U.S.C. 10905 (Supp. IV 1980).

In early April 1982, the CNW began to dismantle the Hayfield line. Hayfield Northern immediately sought injunctive relief in state court to preserve the line intact in order to begin condemnation proceedings.

On April 2, 1982, the Minnesota State District Court granted injunctive relief to the Hayfield Northern.

The CNW immediately removed this case to Federal Court. The State of Minnesota intervened in support of the Hayfield Northern to protect the constitutionality of the state statutes. On July 22, 1982, the District Court dissolved the injunction and dismissed the case, holding that 49 U.S.C. § 10905 preempts state condemnation procedures.

On July 23, 1982, Hayfield Northern and the State filed their notice of appeal. On July 24, 1982, Hayfield Northern sought extraordinary relief, in the form of a stay pending appeal. On July 26, 1982, the Eighth Circuit granted an interim stay pending appeal and scheduled argument for July 28, 1982, on the propriety of the stay. After argument, the Eighth Circuit Court granted the motion for stay pending appeal and Hayfield Northern's oral motion for an expedited appeal upon the posting of $100,000.00 bond on or before August 2, 1982. The bond was posted timely.

On December 3, 1982, the Eighth Circuit Court of Appeals affirmed the judgment of the District Court. The Circuit Court held that the Staggers Rail Act of 1980, 49 U.S.C. 10905 (Supp. IV 1980), preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line." 693 F.2d at 820.

The joint petition for rehearing filed by the Hayfield Northern and the State was denied on January 18, 1983. The

States of Wisconsin and Iowa supported the petition for rehearing. On January 22, 1983, petitioners filed a joint petition to stay the issuance of the Eighth Circuit's mandate. This petition was denied on February 9, 1983 (Appendix H). On February 10, 1983, the joint petition filed by the State and Hayfield Northern was denied by Circuit Justice Blackmun. (Appendix I) On February 22, 1983, Justice Rehnquist denied the request for a stay (Appendix J), after referring the matter to the Solicitor General for the view of the United States. (Amicus Memorandum of the United States is set forth in full in Appendix L). On March 7, 1983, the full Court denied the joint application to stay the mandate (Appendix K).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL[1]

Whether State Power of Eminent Domain May Be Exercised on Abandoned Property That Once Was a Rail Line Regulated by the Federal Government.

The question whether a state or an entity with the delegated power of eminent domain may take an abandoned rail line by eminent domain after the passage of the Staggers Act has

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[1] For reasons set forth in this section, the federal questions presented are substantial. Accordingly, there is no need for the Court to reach the issue whether 28 U.S.C. 1254(2) requires review regardless of "substantiality". As observed by Professors, Wright, Miller, and Cooper:

> The historic analogy to appeals from state courts that gave birth to §1254(2) extends beyond the finality issue to suggest that appeal jurisdiction might be defeated by lack of a substantial question. This possible limitation should be rejected. . . . State court appeals are most likely to be dismissed because a state court has rejected a frivolous attack on a state statute. Appeal lies from a Court of Appeals, on the other hand, only if it has held a state statute invalid. There may be some state statutes that are so transparently invalid that the Supreme Court need not bother with full presentation of arguments. Such cases are apt to be rare. The court can protect itself against them, if they should arise, by summary affirmance rather than by dismissal. Wright, Miller and Cooper, Federal Practice and Procedure §4037, p. 39 (1978).

The authors further suggest at footnote 19 that Rule 16's differentiated treatment of motions to dismiss, depending on whether the appeal comes from a state or a federal court further supports their position. Under Rule 16.1(b), the motion to dismiss an appeal from a state court may be based on failure to present a substantial federal question. Whether a motion to dismiss an appeal from a federal court of appeals under Rule 16.1(c) can be sustained on the ground that there is no substantial federal question is not clear.

broad implications for constitutional ordering of federal and state relationships. The Solicitor General in his amicus memorandum to this Court (Appendix L) stated, "The Court of Appeals decided an important issue of federal law that implicates the interest of several federal agencies and involves delicate questions of federalism . . . [this case involves complex and important] . . . substantive issues . . .". The public interest in this case of first impression is demonstrated by the intervention of the States of Minnesota, Wisconsin and Iowa in support of the position of Hayfield Northern. On information, other states will apply to file briefs amicus.

A certificate of abandonment issued by the Interstate Commerce Commission evidences that the rail line in question is not in interstate commerce but mere property subject to the legitimate processes of state law, including seizure by eminent domain. Abandonment is legally defined as a "permanent or indefinite cessation of rail service" that terminates a railroad's public service obligation. *Gibbons v. United States*, 660 F.2d 1227, 1234 (7th Cir. 1981); 49 U.S.C. § 10903.

A certificate of abandonment relieves the railroad of its common carrier obligations and the costs of providing service. In addition, an abandonment has the effect of removing the line from interstate commerce. Accordingly, the Commerce Clause cannot be used to shield an abandoned rail line from the processes of state law, as opposed to a line in the process

of being abandoned. *See Modern Handcraft, Inc.-Abandonment In Jackson County, Missouri*, 363 I.C.C. 969 (1981). The act of abandonment is proof that a rail line has been removed from interstate commerce and relegated to local interest. The taking of this line by the power of eminent domain does not contravene the Commerce Clause, since this rail line within Minnesota is not in interstate commerce nor does the line have any substantial effect on interstate commerce.

The Staggers Rail Act of 1980 (Staggers Act) amended the Interstate Commerce Act, 49 U.S.C. § 10903-§10905, governing railroad abandonments and discontinuances of services. These sections of the Act reflect congressional concern for the economic condition of the nation's railroads. This condition was made worse by the burden of the body of interstate commerce law and regulations that forced a railroad to continue to operate unprofitable lines while seeking a certificate of abandonment from the I.C.C. Such a certificate often was issued only after protracted administrative and legal proceedings. *See Chicago and North Western Transportation Company v. United States*, 678 F.2d 665 (7th Cir. 1982).

The Eighth Circuit correctly emphasized that the Staggers Act was the congressional response to the protracted administrative and legal proceedings that attended abandonments. *Hayfield Northern Railroad* at 693 F.2d 822. Congress provided a mechanism for quick and easy exist from an unprofitable line. 49 U.S.C. § 10903. Congress also provided a method for purchasing a rail line by an interested party. 49 U.S.C. 10905. In short, the ICC, upon request by a financially responsible party, will set a value on the line within 60 days of

the request for valuation. This value is binding on the railroad but a potential offeror may walk away. *Id.* The congressional history of the act shows that Congress did not deem this to be the sole or exclusive method to be used in purchasing a rail line sought to be abandoned. Congress deemed §10905 to provide a method to purchase the rail line before abandonment. "This program has the advantage of avoiding expensive protracted litigation. It provides the carrier desiring to abandon the line a vehicle for prompt abandonment. It creates a method for transferring the rail properties prior to their downgrading [to wit: before the line is abandoned]." H. Rep. No. 96-1035, 96th Congress 2nd Sess. (1980), reprinted in 1980 U.S. Code Cong. Ad. News 3988. A rail line so purchased has avoided abandonment and continues as a rail line charged with the same regulatory burdens as before the purchase. The purchaser under this procedure has the same interest in title as the abandoning (selling) railroad, i.e. where the selling railroad owns an easement, the new purchaser buys that easement.

The property interest in a rail line taken through condemnation is different. After a seizure by power of eminent domain, the condemnor becomes owner in fee of the property and obtains a new certificate of convenience and necessity from the Interstate Commerce Commission to run the line. This line would not be subject to the same regulatory burdens as existed before abandonment. *See generally Simmons v. Interstate Commerce Commission*, 697 F.2d 326 (D.C. Cir. 1982).

Nowhere in the legislative history of the Act or in the language of the statute does Congress state that the Interstate Commerce Commission was granted exclusive and plenary authority to provide for continuation of rail service in connection with abandonments. *Cf. Equal Employment Opportunity Commission v. Wyoming*, 51 U.S.L.W. 4219 (March 2, 1983)

(where the extension of the Age Discrimination in Employment Act to cover state and local governments was found valid after specific legislative history and congressional findings bolstered preemption.) The Eighth Circuit holding is further undermined by the ICC's response to the Association of American Railroads' (AAR) pleadings (Appendix M) in rule making procedures concerning § 10905. *Ex Parte No. 274 (Subd-No. 6), Abandonment of Railroad Lines and Discontinuance of Service,* (49 C.F.R. Part 1121), 365 I.C.C. 249 (1981). The AAR stated that "[n]othing prevents a state from exercising its rights under the Staggers Act then walking away from the proceeding or decision of the Commission regarding the valuation or purchase price, and beginning a condemnation proceeding seeking . . . favorable treatment by [a state] . . . court." (Appendix M, at A-38). The AAR suggested that prospective State purchasers who make an offer for a line of rail under § 10905 be required to make a 25% non-refundable deposit to the carrier to discourage them from obtaining an ICC valuation, and thereafter "walking away" under 49 U.S.C. 10905(f) (2) to commence state condemnation proceedings. The ICC rebuffed this suggestion as discriminatory against states and effectively eliminating their right to "walk away". Most significant, however, was the fact that the exact issue raised here was raised and the ICC made no indication that the condemnation action the AAR wanted to forestall was not perfectly permissible. The Eighth Circuit inferred that Congress intended to preempt, however.

The practice of inferring legislative intent from legislative silence leads to much guess work and resultant error. Before passage of the Staggers Act Amendments, a state could exercise state process over a rail line once a certificate of abandonment had been issued. *See e.g., New Orleans Terminal Company v. Spencer,* 366 F.2d 160, 164, 166 (5th Cir. 1966); *Com-*

monwealth v. Bartlett, 266 F.Supp. 390, 393 (D.Mass. 1967) *aff'd* 384 F.2d 819 (1st Cir. 1967) *cert. denied* 390 U.S. 1003; *Kansas City Area Transportation v. Ashley*, 555 S.W.2d 9 (Missouri 1977). These decisions acknowledge *sub silentio* that before and during abandonment state interests are subordinated to the I.C.C. *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). The Eighth Circuit accordingly found that Congress by implication repealed existing law concerning the exercise of state sovereignty over abandoned rail lines. Repeals by implication are disfavored. *See e.g., United States v. Borden Company*, 308 U.S. 188, 198-199 (1939). This follows because Congress enacts legislation aware of the common law; without express intention to change common law, the presumption is against change. Where, as here, there are two statutory schemes that are capable of co-existing, (one providing pre-abandonment transfer and the other post-abandonment transfer), courts in the absence of a "clearly expressed congressional intention to the contrary" reconcile the schemes to give effect to both. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This is the case whether the analytical underpinning is statutory construction, *Morton*, or the preemption doctrine. *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440 (1960).

Accordingly, this Court has refused to find conflict between federal and state regulation "unless there is a clear collision with a national law which has the right of way." *Kessler v. Department of Public Safety*, 369 U.S. 153, 172 (1962). The Minnesota scheme and the federal scheme are complementary. Section 10905 provides a method for uninterrupted rail service by a replacement carrier on lines that had been unprofitable for their former owners, while eminent domain provides the states a method to recommence rail service on a line that has been abandoned. Both schemes are in harmony with the dual

congressional objective of (1) permitting railroads swiftly to abandon unprofitable lines and thereby to escape operating costs and (2) placing "the states at the forefront of the federal effort to preserve local rail service". *Simmons v. Interstate Commerce Commission*, 697 F.2d 326, 329 (D.C.Cir. 1982).

In addition, the Interstate Commerce Commission has stated that after a certificate of abandonment has been issued questions of title to, and disposition of property are matters subject to State law. *Ex Parte No. 274 (Sub.-No. 6) Abandonment of Railroad Lines and Discontinuance of Service* (49 C.F.R. Part 1121, 365 I.C.C. 249, 260 (1981)); *accord, Modern Handcraft, Inc.-Abandonment in Jackson County, Missouri*, 363 I.C.C 969 (1981). In *Finance Docket No. 28990F, Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I.C.C. 132, 135 (1980), the Commission said, "When a rail line has been fully abandoned, it is no longer rail line and the transfer of the line is not subject to our jurisdiction. However when a line has not been fully abandoned the transfer of line is subject to our jurisdiction." The Eighth Circuit chose to distinguish these rulings in its decision. 693 F.2d at 823, 824. In doing so, it interpreted §10905 contrary to the expressed view of even the railroad industry lobby, Association of American Railroads (Appendix M, at A-39).

The Eighth Circuit did not have the benefit of the Commission's presence in the proceedings below.[2] The Commission chose not to participate when asked to do so by the CNW at the District Court level and again chose not to participate when asked by the State of Minnesota and the Hayfield Northern at the time of the petition for rehearing (Appendices

[2] Hayfield Northern invited the District Court to refer this case to the ICC for determination. 28 U.S.C. 1336(b). The Eighth Circuit on petition for rehearing and rehearing *en banc* was invited to refer this case to the ICC.

N, O, P). The Commission, however, made available to Congress its view on whether a state or an entity with the delegated power of eminent domain could exercise this power after passage of the Staggers Act. *Id.* These documents all declare that §10905 does not preempt a subsequent condemnation proceeding under state law. These documents were made available to the State of Minnesota after the motions for rehearing were denied by the Eighth Circuit.

It is regrettable that the Commission chose not to come forward in an area of its expertise which involves "delicate questions of federalism." If the Eighth Circuit had had the benefit of Commission wisdom, the Circuit might not have explained away as dictum the language in a recent Seventh Circuit case that assumed that a state has the power to condemn an abandoned rail line. *Chicago and North Western Transportation Company v. United States*, 678 F.2d 665 (7th Cir. 1982). This assumption was essential to the rationale of the Seventh Circuit holding even though this decision involved another issue under the Staggers Act, i.e. the meaning of just compensation under 49 U.S.C. §10905. This conflict in principle among the circuits might have been obviated if the Commission had participated.

The Solicitor General in preparing his amicus pleading to the Court invited the Interstate Commerce Commission to comment. (Appendix Q). These comments, prepared by General Counsel of the ICC, have been approved by the Commission. (Appendix R). General Counsel in these comments disagreed with the holding of the Eighth Circuit Court of Appeals and the Eighth Circuit's interpretation of the congressional history of the Staggers Act. General Counsel commented, in part, as follows:

When Congress amended Section 10905 in the Staggers Rail Act of 1980, it shortened from six months to 110 days the period during which a potential purchaser or subsidizer negotiates with the railroad that is abandoning the line. Compare 49 U.S.C. (Supp. II) 10905(b) with 49 U.S.C. (Supp. IV) 10905(c)-(f). Congress indicated that the amendment "protect[ed] carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980).

The court of appeals interpreted the remarks of the Committee on Conference on the Staggers Act to means [sic] that carriers should be protected from condemnation actions after abandonment has occurred. I believe, however, that Congress referred to the six month proceedings under former Section 10905, during which the abandonment of rail line was held in abeyance while an offeror and the railroad negotiated a subsidy or purchase price. Those proceedings delayed the abandonment. By contrast, the state law condemnation action at issue did not extend abandonment, which already had occurred when Hayfield filed the action.

. . .

I also find a conflict between the court of appeals decision and the interest of the federal government (largely that of DOT) in encouraging states and their subdivisions to continue rail service that is not required in Interstate Commerce. In 1973, Congress enacted a federal entitlement program that allowed states and their subdivisions to continue rail service and provide loans for state acquisition and modernization of rail properties. Sections 401-403, Regional Railroad Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 1010-1012. In 1976, Congress repealed those provisions and replaced them with a comprehensive local rail service assistance program including both entitlement funds and financial assistance. Sections 803, 805, 806, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 130-133, 139-143. See also Chicago & North Western, supra, 678 F.2d 665. As the funds for such en-

titlement programs diminish in an era of fiscal restraint, the states will depend more on condemnation as a means to continue rail service.

Since the Eighth Circuit ruled, the District of Columbia Circuit in *Simmons v. Interstate Commerce Commission*, 697 F.2d 326 (D.C. Cir. 1982), has cited approvingly Commission rules that instruct the Commission lacks "jurisdiction to regulate state acquisition of abandoned rail line, since by the process of abandonment the line lost its status as rail property." *Id.* at 331. *Simmons* involved the limited exemption from common carrier status under the Interstate Commerce Act to states that merely own rail lines and provide financial assistance to service providers. *Simmons* found that the Staggers Act Amendments to the Interstate Commerce Act were in furtherance of the congressional policy of placing the states at the forefront of retaining local rail service. *Id.* at 329. Under this view every effort of a state to preserve rail service is encouraged.

The Eighth Circuit decision is an unwarranted assault on state sovereignty. The Circuit suggests that after an abandonment a State is forever prevented from condemning pursuant to state law. This startling suggestion reduces the state prerogative of eminent domain to insignificance: it prevents condemnation of abandoned rail properties, even when such properties lie solely within one state and are beyond ICC jurisdiction. The power of eminent domain is an essential attribute of sovereignty without which a state cannot be a state. NICHOLS, THE LAW OF EMINENT DOMAIN (3d. Ed. 1981), §1.141 [2]. "The power is as enduring and indestructible as the state itself." *Id.* The power of eminent domain has been distinguished from the police power in that "the former involves the taking of property because of its

need for the public use while the latter involves the regulation of such property to prevent the use thereof in a manner that is detrimental to the public interest." *Id.* at 1.42. The power of eminent domain is "essential to the separate and independent existence" of a state and beyond the reach of the Commerce Clause when the subject is abandoned rail property. *See National League of Cities*, 426 U.S. 833, 845 (1976) (*quoting Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)); *see also, Texas v. White*, 74 U. S. (7 Wall.) 700, 725 (1869) ("The constitution in all its provisions, looks to an indestructible Union, composed of indestructible states.")

The Eighth Circuit decision has the effect of undermining one of the essential powers of sovereign states. Eminent domain has been traditionally and indisputably an attribute of state sovereignty. Since the steam age, the states have exercised the power of eminent domain on abandoned raillines. To remove this power will impair a state's ability "to structure integral operations in areas of traditional governmental functions." *See id.* at 852; *see also, New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 164, 166; *Commonwealth v. Bartlett*, 266 F.Supp. 390, 393 (D.Mass. 1967), *aff'd*, 384 F.2d 819 (1st Cir. 1967), *cert. denied*, 390 U.S. 1003; *Kansas City Area Transportation v. Ashley*, 555 S.W.2d 9 (Missouri 1977) *and cf. United Transportation Union v. Long Island Railroad Company*, 458 U.S. 678 (1982) (running a railroad not a traditional state function). This decision does not merely remove a "police power," since eminent domain is not a "police power," but it repeals a traditional and inseparable attribute of sovereignty. It in effect confers owners of private property with one attribute of sovereignty, since the rail property will not be subject either to federal regula-

tion or to State power. The CNW may sell (at any price) or hold; however, Minnesota may not condemn. (This result is particularly harsh on states such as Wisconsin which may not purchase through §10905 because of constitutional and statutory prohibitions against works of internal improvement. Wis. Const. Art. VIII, §10; Wis. Stat. §85.09. (Appendices S and T). Only abandoned rail property may be purchased, i.e. rail property that has been certified abandoned by the ICC. Section 10905 reaches property that has avoided abandonment.)

CONCLUSION

The appellants submit that they are entitled, as a matter of right, to review by the Court. The standard of review under §1254(2) need not be reached in this case, (*see* footnote 1), since the lower courts' assault on state sovereignty presents a substantial federal question. Therefore, this case is of great public interest and requires plenary consideration by the Court.

Respectfully submitted,

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